

Grand Chamber Judgment on Trade Union Freedom of Expression

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The Grand Chamber of the European Court issued a landmark judgment this week on trade union freedom of expression, concluding that the dismissal of trade union members for engaging in offensive and insulting expression in a union newsletter was not a violation of the right to freedom of expression, read in light of freedom of association.

The applicants in [*Palomo Sánchez v. Spain*](#) were executive members of a trade union who had been dismissed by their employer following the publication of the union newsletter. The newsletter reported on a recent labour tribunal judgment the applicants had successfully taken against their employer. The cover of the newsletter included a cartoon depicting certain employees who had testified against the union waiting to sexually satisfy a member of management. The cartoon was accompanied by two articles, one entitled “When you’ve rented out your arse you can’t shit when you please,” which severely criticised these employees and management, using language which was vulgar and coarse. The newsletter was distributed to staff and posted on the union notice board within the company.

The applicants were dismissed for serious misconduct, on the grounds that the union newsletter had impugned the reputation of those depicted in the cartoon. The domestic court upheld this decision on appeal, holding that freedom of expression did not include a right to insult others. The applicants made an application to the European Court, claiming that the Spanish courts had failed in their positive obligations under Article 10 and 11 of the European Convention to adequately protect the applicants’ rights to freedom of expression and association.

The Third Section of the Court held that there had been [*no violation*](#) of Article 10 and 11, with Judge Power the sole dissent. A panel of the Grand Chamber decided to accept a request for referral of the Chamber judgment to the Grand Chamber.

As a preliminary issue, the Grand Chamber decided it would proceed on the novel basis of examining whether the domestic courts – by upholding the dismissals – had adequately secured the applicants’ right to freedom of expression, *interpreted in the light of freedom of association*.

Given that this was the first occasion for the European Court to consider trade union freedom of expression, a number of uncontroversial principles were laid down by the Court: it took the view that trade union expression must include the right to seek to improve the situation of workers, and freedom of expression was a *conditio sin qua non* for the development of trade unions. Moreover, national authorities are required to ensure that disproportionate penalties do not dissuade trade unions from seeking to express and defend their interests.

The Court proceeded by firstly noting that there had been no interference with the right to trade union freedom, since the dismissals were due to the content of the union newsletter and not membership of the union. Secondly, the Court saw no reason to call into question the finding of the domestic courts that the cartoons and articles were offensive and capable of harming the reputation of those depicted. The Court made reference to the accusation in the articles of

“infamy” against the employees, “denouncing them for ‘selling’ the other workers and for forfeiting their dignity”. The Court termed these accusations as “vexatious and injurious terms”.

Importantly, the Court stated that a clear distinction must be made between criticism and insult, with the latter justifying sanctions. In a similar vein, the Court then referred to a principle from the Committee on Freedom of Association of the International Labour Organisation, “in expressing their opinions, trade union organisations should respect the limits of propriety and refrain from the use of insulting language.”

Thus, the Court concluded that the domestic courts’ decision that the applicants had overstepped the limits of “admissible criticism” in labour relations could not be regarded as unfounded or devoid of a reasonable basis in fact.

The final issue for the Court was whether the sanctions in the form of dismissal were consistent with the principle of proportionality. The Court firstly noted in this regard that the cartoon and articles were published in the context of a labour dispute, and was thus a contribution to a debate of general interest to the workers. However, the Court reiterated that acceptable criticism is narrower as regards private individuals, and noted that the cartoon and articles contained criticism not only against the company, but also other employees.

Ultimately, the Court concluded that the existence of a matter of public interest could not justify the use of offensive cartoons and expression, even in the context of labour relations (again citing the Committee of Freedom of Association as authority for this proposition). Moreover, the Court also emphasised that the cartoon and articles were not instantaneous and ill-considered reactions in the context of a rapid and spontaneous oral exchange, but rather written assertions published in a lucid manner and displayed publicly. Finally, the Court also noted that the cartoons were intended more as an attack on colleagues for testifying than as a means of promoting trade union action.

The Court concluded that the use of grossly insulting or offensive expressions in the professional environment is particularly serious forms of misconduct justifying severe sanctions, and consequently the dismissal was not manifestly disproportionate. Therefore, the Court concluded that the domestic courts had not failed in their positive obligations under Article 10, considered in the light of Article 11.

Comment

The importance of this judgment for trade union expression cannot be overstated. Five judges dissented, with the tone of the dissenting opinion providing a rare insight into the level of division within the Grand Chamber, and the importance of the principles involved. The dissent accused the majority of “speculation” and “ignorance” of trade union activity, and giving certain issues “scant consideration”. The majority may be taken to task on a number of issues:

Firstly, the Court utterly fails to assess the cartoons and articles *in concreto* by reference to Article 10 principles, to determine whether the expression overstepped the bounds of remarks that “shock, offend and disturb” ([*Lingens v. Austria*](#), para. 41). This point is borne out by the

fact that the Court simply ignored the applicants' submission that the cartoon was to be viewed as a caricature, with the articles being satirical and ironic. Even the Spanish government sought to rebut this point, but the Court crassly decided to ignore the submission, which leaves the legitimacy of this judgment open to serious question. Curiously, the Court also failed to consider the seminal case on satire, art and insult, namely [*Küntsler v. Austria*](#), which the Spanish government also sought to distinguish. The dissent rightly cites the abundant case law on satirical expression, concluding that the cartoon and articles did not sufficiently prejudice the private lives of those depicted (applying [*A. v. Norway*](#), para. 64).

Secondly, the consideration the Court gives to the severe sanction imposed, namely dismissal, is particularly questionable. The minority cited [*Fuentes Bobo v. Spain*](#) as authority for the proposition that less severe sanctions other than dismissal should have been considered. However, there is also the Grand Chamber judgment in [*Guja v. Moldova*](#) which found that dismissal was the heaviest sanction, and other less severe penalties should have been considered. The Court in *Palomo Sánchez* consequently ignored the chilling effect such a sanction would have on trade union expression more generally, as trade unions will be deterred from engaging in legitimate harsh criticism lest dismissal result.

Finally, it is reasonable to argue that the Court failed to grasp the distinction between trade union expression and employee expression. There is a clear distinction between employees *as union members* engaging in critical expression, and employees *in their capacity as employees* engaging in critical expression. The former is trade union expression, while the latter is not. The minority admonish the Court for paying "scant attention" to this fact, with the minority being of the view that trade union expression warrants a high degree of protection, whereby the Court's jurisprudence applicable to media freedom should be fully extended to trade unions due to their role as "watchdogs" for workers' interests.

All things considered, the judgment in *Palomo Sánchez* represents a retrograde step in terms of freedom of expression generally. While many will take heart from the recognition by the Court of trade union freedom, the Court seemed to approve the principle that trade unions cannot engage in offensive and insulting speech, a dangerous proposition which will chill the speech of unions generally.

[For a comment on the original Chamber judgment, cited by the Grand Chamber minority, see [*Voorhoof and Englebert*](#)]